

THIRD ~~FOURTH~~ FURTHER AMENDED STATEMENT OF CLAIM

(Amended pursuant to orders made by Garling J on 5 March 2020)

COURT DETAILS

Court	Supreme Court of New South Wales
Division	Common Law
List	Civil
Registry	Sydney
Case number	2014 / 223271

TITLE OF PROCEEDINGS

Plaintiff	David Moore
Defendant	Scenic Tours Pty Limited

FILING DETAILS

Filed for	David Moore , plaintiff
Legal representative	Benjamin Hemsworth Somerville Legal (ACN 117 159 172) Level 2, 65 Berry Street <u>Level 10, 32 Walker Street</u> North Sydney DX 40573- <u>10502</u> North Sydney
Legal representative reference	23951
Contact name and telephone	<u>Adam Cutri-Cameron Graham</u> (02) 9923 2321

TYPE OF CLAIM

Common Law – Money claim

RELIEF CLAIMED

The plaintiff claims the following relief on his behalf and on behalf of other group members:

- 1 An order for compensation pursuant to s 267 (3) and/or (4) of the *Australian Consumer Law* (in Schedule 2 of the *Competition and Consumer Act 2010* (Cth)).
- 2 Further or alternatively, an order for personal injury damages pursuant Part VIB of the *Competition and Consumer Act 2010* (Cth).
- 2A In the alternative, an order for restitution
- 3 A declaration that in the circumstances pleaded in this further amended statement of claim the defendant engaged in conduct in trade and commerce that was unconscionable pursuant to Section 21 of the *Australian Consumer Law* (in Schedule 2 of the *Competition and Consumer Act 2010* (Cth)).
- 4 A declaration that cll 2.6(d), 2.10(d)-(h) and 2.13 of the Terms and Conditions to the contract entered into by the plaintiff and the group members with the defendant are 'unjust' provisions pursuant to ss 7 and 9 of the *Contracts Review Act 1980* (NSW).
- 5 An order pursuant to Section 243(c) of the *Australian Consumer Law* (in Schedule 2 of the *Competition and Consumer Act 2010* (Cth)) and/or Section 7(1)(a) of the *Contracts Review Act 1980* (NSW) that the defendant not be permitted to enforce any or all of cll 2.6(d), 2.10(d)-(h) and 2.13 of the Terms and Conditions to the contract entered into by the plaintiff and the group members with the defendant.
- 5A Further, or alternatively to prayer 5, an order pursuant to ss 237(1) and 243 of the *Australian Consumer Law* (in Schedule 2 of the *Competition and Consumer Act 2010* (Cth)), an order that the defendant be not permitted to rely upon any or all of cll 2.6(d), 2.10(d)-(h) and 2.13 of the Terms and Conditions to the contract entered into by the plaintiff and the group members with the defendant in defence to the claims made against the defendant in this proceeding.
- 6 A declaration that cll 2.6(d) and 2.10(d)-(h) are 'unfair' provisions for the purposes of Section 24 of the *Australian Consumer Law* (in Schedule 2 of the *Competition and*

Consumer Act 2010 (Cth)).

- 7 An order that cll 2.6(d) and 2.10(d)-(h) be avoided pursuant to Section 23 of the *Australian Consumer Law* (in Schedule 2 of the *Competition and Consumer Act 2010 (Cth)*).
- 8 Such further or other orders as the Court thinks fit.
- 9 Interest
- 10 Costs.

PLEADINGS AND PARTICULARS

1. This proceeding is commenced as a representative proceeding pursuant to ss 157-158 of the *Civil Procedure Act 2005 (NSW)*.

Description of the group

2. The plaintiff and the persons he represents in these proceedings (the 'Group Members') are each persons who:
 - (a) had booked and paid for river cruises in Europe scheduled from 10 May 2013 to 14 June 2013 (hereafter the '**relevant period**'); or
 - (b) had acquired the services of the defendant trading as "Scenic Tours" and "Evergreen Tours" concerning the operation of river cruises in Europe during the relevant period; and
 - (ba) did not book and pay for a river cruise or acquire the services of the defendant concerning the operation of river cruises through Scenic Tours (UK) Limited; and

- (c) suffered loss or damage because of the conduct of the defendant in contravention of a provision of chapter 3 of the *Australian Consumer Law*; and
- (d) is not a legal practitioner or funder providing (respectively) services to the plaintiff and other group members, in order to assist them to recover the relief claimed in this proceeding; or
- (e) is not a passenger who travelled from Budapest to Istanbul on cruise BUBC080613.1 commencing 8 June 2013.
- (f) is not a passenger who travelled on the following cruises:
 - i. EGRC110513.1;
 - ii. STC130513.1;
 - iii. STC130513.2;
 - iv. STC150513.1;
 - v. STC150513.2;
 - vi. STC200513.1;
 - vii. BUBC010613.1; and
 - viii. FRCR020613.1.

The defendant

- 3. At all material times, the defendant is an incorporated entity able to be sued in its own corporate name and style.
- 4. At all material times, the plaintiff and group members acquired the “services” of the defendant as “consumers” for the purposes of ss 2 & 3(3) (respectively) of the Australian Consumer Law contained in Schedule 2 of the *Competition and Consumer Act 2010 (Cth)* (hereafter ‘the **Australian Consumer Law**’).

Particulars

As to 'services', rights, benefits, privileges or facilities were provided, or were to be provided, by the defendant to the plaintiff and all group members in trade or commerce, to arrange for and facilitate travel cruises along European rivers for the use, amusement, entertainment, recreation or instruction of the group members. Without limitation, the services included the defendant arranging for the tours and monitoring and assessing (and thereafter communicating with the plaintiffs and group members), up to the dates for departure for the cruises, whether their tour itineraries could proceed in accordance with the existing arrangements, or should be varied, cancelled or delayed.

As to 'consumers', the plaintiff paid the defendant the sum of \$13,100 for the service, which service was of a kind ordinarily acquired for personal use. In the case of all the group members, reliance is placed upon the presumption in s 3(10) of the Australian Consumer Law.

Further particulars concerning the individual position of all group members, in terms of the date of the supply and price of service, will await the prior determination of common issues.

5. At all material times, the defendant supplied the said services in trade or commerce.

The consumer guarantees

6. In supplying the said services to the plaintiff and group members in trade or commerce, the defendant guaranteed the plaintiff and group members that services would be rendered with due care and skill (the '**care and skill guarantee**').

Particulars

The guarantee arose in law pursuant to s 60 of the Australian Consumer Law

7. Further and/or alternatively, the plaintiff and group members made known to the defendant that the particular purpose for the acquisition of services from them, as suppliers, was the experience of enjoying travel and accommodation, by cruise, along European rivers to a range of tourist destinations.

Particulars

In the case of the plaintiff and all group members, the particular purpose was impliedly made known by them to the defendant by: the nature of the relationship between the plaintiff and group members and the defendant (the supply of recreational services to each and every one of them), the purpose of the transactions that the plaintiff and group members entered into with the defendant and the booking of and payment for a cruise holiday along the rivers by all of them.

Group members reserve the right to contend that the particular purpose was also made expressly known by the group members to the defendant; however this would be the subject of individual enquiry and may be subject of further particulars after determination of the common issues.

8. Further and/or alternatively, the plaintiff and group members made known to the defendant that the desired result that they wished to achieve from the acquisition of services from them was the experience of enjoying travel and accommodation, by cruise, along European rivers to a range of tourist destination.

Particulars

In the case of the plaintiff and all group members, the desired result was impliedly made known by the plaintiff and each of group members by: the nature of the relationship between the plaintiff and group members and the defendant, the purpose of the transactions that the plaintiff and group members entered into with the defendant and the booking of and payment for a cruise holiday along the rivers by the plaintiff and group members.

Group members reserve the right to contend that the desired result was also made expressly known by the group members to the defendant; however this would be the subject of individual enquiry and may be subject of further particulars after determination of the common issues.

9. In the premises, in supplying the said services to the plaintiff and group members in trade or commerce, the defendant further guaranteed them that:

- (a) The services supplied would be reasonably fit for that purpose (the '**purpose guarantee**').

Particulars

The guarantee arose in law pursuant to s 61(1) of the Australian consumer Law.

- (b) The services might reasonably be expected to achieve that result (the '**result guarantee**').

Particulars

The guarantee arose in law pursuant to s 61(2) of the Australian Consumer law

The flooding

10. From about April and early May 2013, there was extensive flooding in Europe, causing rising river levels along the paths of the cruises arranged for by the defendant.

11. The defendant, through their officers, employees or agents, knew or should have known from about 3 May 2013 that the rising river levels would, or were likely to, substantially disrupt, for a period of approximately 6 weeks thereafter, the enjoyment of passengers scheduled to embark upon river cruises.

Particulars

Currently, the plaintiff and group members contend that such knowledge ought to have been known to the defendant as reasonable tour arrangers conducting business Europe, being river cruises along European rivers in trade or commerce.

The actual knowledge of the defendant is a matter peculiarly within the knowledge of the defendant and further particulars are referred to in the letter from the plaintiff's solicitor to the defendant's solicitor dated 14 October 2015 (as amended by letter dated 16 November 2015).

Contravention of consumer guarantees

12. In contravention of the care and skill guarantee, the defendant failed to exercise due care in supplying the services by:

- (a) failing to make any, or any adequate, enquiry, prior to the relevant period, into the nature and extent of flooding and rising river levels in Europe by the severe rainfall in late April and early May 2013;
- (b) failing to determine, prior to the relevant period, that the nature and extent of flooding and rising river levels in Europe was such that by late April and early May 2013, it was inconceivable that the scheduled river cruises could proceed otherwise than without by substantial disruption or delay; or (alternatively);
- (c) unreasonably determining, prior to the relevant period, that the nature and extent of flooding and rising river levels in Europe were not so severe as to be likely to substantially impede the enjoyment of passengers scheduled to be embarked on river cruises a period of approximately 6 weeks from about 3 May 2013;
- (d) failing, from about 3 May 2013, to cancel or delay the tours of the plaintiff and group members scheduled to occur in the relevant period, pending the receipt of information that would lead reasonable tour operators to conclude that the flooding and rising river levels had sufficiently abated so as to make it likely that the plaintiff and group members could substantially enjoy the benefit of travelling to the scheduled tour destinations by river cruise;
- (e) failing, prior to the embarkation of the plaintiff and some group members on various scheduled cruises, to unilaterally cancel their tours and offer them the closest available tour or cruise departure (after forming a reasonable view as

to when the river levels would recede so as to enable the cruises to resume along the rivers);

Particulars

The various scheduled cruises are

- (a) FRCR190513.1
- (b) STC290513.1
- (c) STC290513.2
- (d) STC030613.1
- (e) EGRC080613.1
- (f) STC100613.2

(ea) alternatively to (e), failing, prior to the embarkation of the plaintiff and some group members on various scheduled cruises, to offer to passengers on those cruises, the opportunity to cancel their tours and offer them the closest available tour or cruise departure (after forming a reasonable view as to when the river levels would recede so as to enable the cruises to resume along the rivers;

Particulars

The various scheduled cruises, and the dates by which the offer to cancel should have been given to passengers on those cruises are:

- (a) FRCR190513.1, by 18 May 2013
- (b) STC270513.1, by 25 May 2013
- (c) STC270513.2 by 26 May 2013
- (d) STC290513.1, by 28 May 2013
- (e) STC290513.2, by 28 May 2013
- (f) STC030613.1, by 2 June 2013
- (g) EGRC080613.1, by 6 June 2013
- (h) STC100613.1, by 8 June 2013
- (i) STC100613.2, by 8 June 2013
- (j) STC120613.1, by 11 June 2013
- (j) STC120613.2, by 11 June 2013

(eb) failing, after the embarkation of the plaintiff and some group members on various scheduled cruises, to offer to passengers on those cruises, the

opportunity to cancel their tours and offer them the closest available tour or cruise departure (after forming a reasonable view as to when the river levels would recede so as to enable the cruises to resume along the rivers;

Particulars

The various scheduled cruises, and the dates by which the offer to cancel should have been given to passengers on those cruises are:

- (a) STC200513.2, by 27 May 2013
- (b) EGFC250513.1, by 30 May 2013
- (c) STC270513.1, by 30 May 2013
- (d) STC270513.2, by 3 June 2013

(f) failing, prior to the departure of the plaintiff and group members, to delay the tours until after such time when, having taken into account and having formed a reasonable view as to the river levels would recede so as to enable the cruises to resume along the rivers; and

(g) failing, from about 3 May 2013, to warn the plaintiff and group members, prior to their departure from their departing countries to commence their scheduled tours, that the weather and river conditions in Europe were such that it was unlikely that the plaintiff and group members would be able to enjoy, or substantially enjoy, the benefit of travelling to scheduled tour destinations by river cruise.

13. By reason of the facts and circumstances alleged in paragraphs 7, 9(a) and 10-12 (incl), in contravention of the purpose guarantee, the services provided by the defendant were not reasonably fit for the particular purpose for which they were acquired, in that the plaintiff and group members did not enjoy, or substantially enjoy, the benefit of travel and accommodation by cruising European rivers to scheduled destinations.

14. By reason of the facts and circumstances alleged in paragraphs 8, 9(b) and 10-12 (incl), in contravention of the result guarantee, the services were not of such nature and quality as reasonably might be expected to achieve the result the subject of the

result guarantee, in that the plaintiff and group members did not enjoy, or substantially enjoy, the benefit of travel and accommodation by cruising across European rivers to scheduled destinations in accordance with their scheduled tours.

Loss and damage

15. The plaintiff and group members suffered loss or damage because of the said contraventions of the care and skill guarantee, purpose guarantee and/or result guarantee, in that, having embarked upon their respective tour itineraries during the relevant period they did not experience, or substantially experience, travel and accommodation on cruises along the European rivers and touring to scheduled destinations by river cruise at all.

16. The services purportedly supplied to the plaintiff and group members:
 - (a) would not have been acquired by a reasonable consumer fully acquainted with the nature and extent of the failure to comply with care and skill guarantee, the purpose guarantee and/or the result guarantee; and/or

 - (b) were substantially unfit for the purpose for which service is of the same kind were commonly supplied would not, easily and within a reasonable time, be remedied so as to make fit the such purpose; and/or

 - (c) were unfit for the particular purpose they were acquired by the plaintiff and group members that was made known to the defendant and could not easily and within a reasonable time, be remedied so as to make them fit for such purpose; and/or

 - (d) were not of such a nature, quality, state or condition that might reasonably be expected to achieve the result desired by the plaintiff and group members, that was made known to the defendant and could not easily and within a reasonable time, be remedied to achieve such a result.

17. In the premises, the said failures to comply with the consumer guarantees could not, or cannot be remedied, or were a 'major failure' within the meaning of ss 267(3) and 268 of the Australian Consumer Law.

Particulars

The plaintiff contends, support of his personal claim, that he suffered the following loss and damage:

- (a) the price of the tour;
- (b) a reduction the value of services below the price paid by him or those services;
- (c) inconvenience, distress and disappointment; and
- (d) loss of the opportunity to consider and accept any proposed alternative tour or cruise offered by the defendant, and (should such alternative have been rejected by the plaintiff) to terminate arrangements with the defendant and receive a full refund of all amounts paid to the defendant.

Particulars of the losses and damage suffered by individual group members will be supplied after the determination of common issues in the plaintiff's case.

Restitution – action for money had and received

17AA The plaintiff refers to and repeats paragraphs 4 and 7- 8 above.

17AB The plaintiff and each of the group members paid the defendant a tour price to enable their participation in the tours, by cruise, set out in their respective itineraries.

17AC. A distinct or severable component of each tour price was an amount for the tour by cruise (the '**cruise component of the tour price**').

17AD The said payments by the plaintiff and each group member to the defendant were made:

- (a) in contemplation that cruising would occur over an identified number of days as set out in respective itineraries;
- (b) without any specific entitlement conferred upon, or provision made for the defendant to retain the cruise component of the tour price in the event that cruising did not occur over the days identified in the itineraries.

17AE. In the circumstances that occurred, the cruises upon which the plaintiff and each group member respectively embarked were significantly disrupted (by river or weather conditions along the cruise-paths), such that there was a substantial diminution of days cruising over the duration of the tours.

Particulars

- (a) In respect to the cruise with the code FRCR190513.1, there were 10 days in which cruising was interrupted for each passenger on this cruise;
- (b) In respect to the cruise with the code STC200513.2, there were 6 days in which cruising was interrupted for each passenger on this cruise;
- (c) In respect to the cruise with the code EGFC250513.1 there were 9 days in which cruising was interrupted for each passenger on this cruise;
- (d) In respect to the cruise with the code STC270513.1 there were 11 days in which cruising was interrupted for each passenger on this cruise;
- (e) In respect to the cruise with the code STC270513.2, there were 9 days in which cruising was interrupted for each passenger on this cruise;
- (f) In respect to the cruise with the code STC290513.1, there were 11 days in which cruising was interrupted for each passenger on this cruise;
- (g) In respect to the cruise with the code STC290513.2, there were 8 days in which cruising was interrupted for each passenger on this cruise;

- (h) In respect to the cruise with the code STC030613.1, there were 10 days in which cruising was interrupted for each passenger on this cruise
- (i) In respect to the cruise with the code EGRC080613.1, there were 8 days in which cruising was interrupted for each passenger on this cruise
- (j) In respect to the cruise with the code STC100613.1, there were 5 days in which cruising was interrupted for each passenger on this cruise
- (k) In respect to the cruise with the code STC100613.2, there were 6 days in which cruising was interrupted for each passenger on this cruise
- (l) In respect to the cruise with the code STC120613.1, there was 1 day in which cruising was interrupted for each passenger on this cruise; and
- (m) In respect to the cruise with the code STC120613.2, there were 2 days in which cruising was interrupted for each passenger on this cruise

17AF In the premises, the purpose for which the cruise component of the tour price was paid by the plaintiff and each group member to the defendant failed to the extent that the period of uninterrupted cruising was diminished.

17AG If the defendant is found not to have contravened any or all of the consumer guarantees, then the plaintiff and each group member will be left without remedy, other than for money had and received by the defendant to the use of the plaintiff and group members.

17AH In the premises, it would be unjust or inequitable for the defendant to retain payments by the plaintiff and group members constituting the cruise component of the tour price in the respective itineraries.

Unconscionable conduct & Unjust provisions in the contracts

17A. The plaintiff refers to and repeats paragraphs 4(b), 21 and 22 of the Amended Defence.

17B. The said contracts with the plaintiff and the group members required the defendant to provide the services referred to in paragraphs 1(a) and 1(b) of the plaintiff's Reply.

17C. The circumstances in which the contracts were entered into and the defendant's purported performance of the contracts was in trade or commerce in connection with the supply of the said services.

Particulars

The material circumstances in which the contracts were entered are referred to at paragraphs 4-9 above, 17D-F (incl). The defendant's conduct in purported performance of its obligations under the contracts is referred to in paragraphs 12-14(incl) above 17H (incl) below.

17D. The said contracts were:

- (a) 'consumer contracts' for the purposes of s 23(3) of *the Australian Consumer Law*; and

Particulars

The plaintiff and each group member acquired the services wholly or predominantly for personal use or consumption.

- (b) by the inclusion of the Terms and Conditions relied upon by the defendant in its Amended Defence, also 'standard form contracts' for the purposes of s 27 of the *Australian Consumer Law*.

Particulars

The plaintiff and group members rely upon the presumption in s 27(1) of the *Australian Consumer Law*.

17E. The said contracts were entered into in circumstances whereby:

- (a) there was a material inequality in bargaining power between the plaintiff and each group member and the defendant as to the

negotiation of the terms and conditions for the supply and acquisition of the services to be provided by the defendants;

- (b) the terms and conditions in the contracts were not the subject of any real or reasonable negotiation as between the defendant, the plaintiff and each group member, and the defendant, prior to or at the time that the contracts were entered;

Particulars

In the events that occurred:

- i. the Terms and Conditions were contained on p 218 in a 225-page booklet that promoted every category of cruise;
- ii. the plaintiff and group members paid a booking deposit which, temporarily, secured a place on a scheduled cruise;
- iii. the plaintiff and group members thereafter paid the balance of the tour price;
- iv. following the steps in (ii) and (iii) above, the plaintiff and group members received from the defendant 'Documentation' which included a tour booklet containing tour itinerary, map and the Terms and Conditions. This travel booklet identified the Terms and Conditions more prominently than the travel brochure referred to in (i).
- v. However, by its terms, the Terms and Conditions purported to bind passengers upon payment of the booking deposit or tour price, so that the heightened prominence given to the terms and conditions by step (iv) was only apparent to group members after they had already booked and paid for the cruises.

- vi. Further, (and separately) depending upon when the travel booklet (referred to in (iv), above) was received, a group member who objected to any term and who sought to cancel the cruise was, or would be, exposed to liability to pay a cancellation fee amounting to the entirety of the tour price.
- (c) the terms and conditions in the contracts were all standard terms of the defendant's contract, such that it was not reasonably practicable for the plaintiff, or any other group member, to negotiate for the alteration or rejection of any of the provisions in the contract;

Particulars

The plaintiff repeats the particulars to sub-paragraph 17E(b), above.

- (d). none of the terms and conditions in the contracts were the subject of any explanation by or on behalf of the defendants, in terms of their legal or practical effect and were only reasonably brought to the notice of the plaintiff and group members after they had paid the booking deposit or tour price; and

Particulars

- i. There was an absence of transparency in the original way that terms and conditions were brought to the attention of the plaintiff and group members. This is indicated by the circumstance that the Terms and Conditions in the 2013/14 Scenic Tours 'Europe River Cruises & Tours' appeared, in small font, on page 218 of a booklet comprising about 225 pages. This booklet was available for prospective cruise passengers from local tour agents.
- ii. it was only after a deposit and balance of the tour price was fully paid, by which time they were purportedly bound by the Terms and Conditions, that passengers received a smaller travel booklet which more prominently brought the said terms and conditions to the attention of the plaintiff and group members.

- (e) the commercial, setting, purpose and effect of the contracts was to provide for passengers travel by cruise along European rivers with the benefit of luxurious dining and accommodation on board, to a range of tourist destinations.

17F. At about the date when the said contracts were entered into by the plaintiff, and group members, the defendants:

- (a) knew that each of them wished to experience and enjoy travel and accommodation, by cruise, along European rivers to a range of tourist destinations;
- (b). knew that the said contracts contained terms and conditions that purportedly entitled the defendants:
 - (i) to charge cancellation fees should customers decide to cancel their respective tours prior to the relevant departure date (cl 2.6(d))
 - (ii) to change or vary tour itineraries on account of a range of circumstances (cl 2.10(d)-(f));
 - (iii) substitute coaches and provide alternative accommodation for all or part of a tour where necessary (cl 2.10(g));
 - (iv) to exclude any liability for such variations (cl 2.10(h)); and
 - (v) to disclaim any liability suffered by the plaintiff and group members for any loss, cost or damage (including loss of enjoyment) suffered by them directly or indirectly in connection with (inter alia):
 - (i) any changes to itineraries;
 - (ii) any loss or enjoyment due to circumstances outlined in the contract (cl 2.13(a)).

17G. The defendant knew (and/or reasonable tour arrangers in their position would have known) from about 3 May 2013 that:

- (a) rising river levels would, or were likely to, substantially disrupt for a period of approximately 6 weeks thereafter, the enjoyment of passengers scheduled to embark upon river cruises, in that cruising itself was, or would be prevented, or impeded, that accommodation and dining was, or was likely to be required on-shore and travel to destinations would require coach travel on-shore;

Particulars

The plaintiff relies upon the particulars in paragraph 11 of the Further Amended Statement of Claim.

- (b) the said disruption would, or was likely to, substantially negate the wishes (referred to in paragraph 17F(a) above) of the plaintiff and group members, and frustrate the purpose and result sought to be obtained from the tours by the plaintiff and group members described in paragraphs 7 & 8 above (respectively).

17H. Notwithstanding the said knowledge, the defendant:

- (a) engaged in the conduct described in paragraph 12 of the Amended Statement of Claim;
- (b) permitted the plaintiff and group members to suffer the negation of their wishes and the frustration of the purpose and result to be derived from the tours, by facilitating an experience involving substantially limited or no travelling by cruise, the substitution of coach travel and on-shore accommodation and dining;
- (c) has, by its Amended Defence in this proceeding, sought to rely upon terms and conditions in the respective contracts (referred to in subparagraph 17F(b)(above) to excuse, exclude or disclaim any liability for their conduct having regard to that knowledge.

17I. In the premises:

- (a) the defendant engaged in conduct, in trade or commerce, that was unconscionable in all the circumstances, within the meaning of s 21 of the *Australian Consumer Law*;

Particulars

With reference to the facts and circumstances pleaded in sub-paragraphs 17D- 17H (incl), the plaintiff relies upon the considerations referred to in s 22(1)(a), & (d), of the *Australian Consumer Law*; and as to each of these statutory considerations, the plaintiff says:

- i. the plaintiff and group members were in no real or meaningful position to bargain the terms and conditions;
 - ii. it was an unfair tactic for the defendant to purportedly bind the plaintiff and group member to terms and conditions upon payment of the booking deposit or tour price, given the lack of transparency or prominence given to the content of those terms in a voluminous tour brochure. There was also undue influence or pressure in circumstances where, if group members objected to the content of the terms and conditions after they were contractually bound, their only practical choice was to cancel the tour which might, depending upon the timing of such decision, occasion payment of a cancellation fee for the entire tour price.
- (b) the provisions in cll 2.6(d), 2.10(d)-(h) and 2.13 of the Terms and Conditions in the contracts, as between the plaintiff and each group member, are unjust provisions within the meaning of ss 7 & 9 of the *Contracts Review Act 1980 (NSW)*.

Particulars

With reference to the facts and circumstances pleaded (and particularised) in sub-paragraphs 17D-17I(a), the plaintiff relies upon

the considerations referred to in s 9(2)(a), (b), (c), (i), (j) and (l) of the *Contracts Review Act*.

Unfair terms

17J. Further, the plaintiff and group members say that:

- (a) clause 2.10 of the Terms and Conditions to the Contracts between the plaintiff, group member and the defendant purported to entitle the defendant to unilaterally vary the tour itineraries of the plaintiff and group members, whilst excluding any liability for doing so.
- (b) by its terms, clause 2.10 would and/or did permit (or had the effect of so permitting) the defendant to:
 - i. refrain from entering into any discussion or negotiation with the plaintiff and group members as to whether they may wish to cancel their respective tours on account of river or weather conditions (known, or which ought to have been known by the defendant) which would, or which were likely, to frustrate the wish, purpose or result of the plaintiff and group members to enjoy travel, accommodation and dining by cruise, and the terms of such cancellation;
 - ii. unilaterally determine for itself that a substantially different holiday experience, involving substantial transportation by coaches and accommodation and dining on-shore, would be provided to the plaintiff and group members, irrespective of whether or not such experience was that which was promoted by the defendant or bargained for by the plaintiff and group members when they paid their purchase price for the tours;
 - iii. avoid or limit the performance of the contract by the defendant;
and

- iv exclude liability for any loss arising from that substantially different holiday experience.
- (c) clause 2.10:
- i. caused a significant imbalance in the rights and obligations arising under the contract;
 - ii. was not reasonably necessary in order to protect the defendant's legitimate interests.

Particulars

The plaintiff and group members rely upon the presumption in s 24(4) of the *Australian Consumer Law*.

- iii. would cause detriment to the plaintiff and group members if applied or relied upon.

Particulars

The detriment is partly a loss in value between what the plaintiff and group members bargained for (a holiday by cruise) and what they received (a holiday, substantially, by coach tour and on-shore accommodation) and partly the disappointment sustained from not receiving the enjoyment expected to be derived from travel, accommodation and dining by cruise.

- (d) in the premises:
- i. cl 2.10 is 'unfair' within the meaning of s 24 of the *Australian Consumer Law*; and
 - ii. should be avoided pursuant to s 23 of the *Australian Consumer Law*.
- (e) clause 2.6(d) of the terms and conditions of the Contracts entered between the plaintiff and group members and the defendant purportedly entitled the defendant to charge a cancellation fee,

representing 100% of the Tour Price, in the event that the plaintiff or group member decided to cancel their (respective) tours prior to the relevant departure date less than approximately 2 months prior to the departure date.

- (f) by its terms, cl 2.6(d) would permit (or effectively permit) the defendant to charge the said cancellation fee even if, following information or advice provided by the defendant to the plaintiff and group members about the reduced prospects that they would be able to enjoy their holiday cruise on account of weather or river conditions, the plaintiff and group members, the plaintiff or other group members decided to cancel their tours prior to the relevant departure date.
- (g) by its Amended Defence in this proceeding, the defendant says (in paragraph 24) that even if the plaintiff and group members suffered any loss or damage because of the defendant's failure to comply with the consumer guarantees, it would have sustained loss or damage in any event because of a liability to pay to the defendant the said cancellation fee to the defendant.
- (h) clause 2.6:
 - i. would cause significant imbalance in the parties' rights and obligations arising under the contract;
 - ii. is not reasonably necessary to protect the legitimate interests of the defendant (as the party advantaged by the term);

Particulars

The plaintiff and group members rely upon the presumption in s 24(4) of the *Australian Consumer Law*.

- iii. would cause a financial detriment to the plaintiff and group members if it were to be applied and relied on.

Particulars

The detriment being the amount of the cancellation fee.

- (i) in the premises:
 - i. clause 2.6 is an 'unfair' term, within the meaning of s 24 of the *Australian Consumer Law*;
 - ii. should be avoided pursuant to s 23 of the *Australian Consumer Law*.

Specification of common questions

18. The questions common to the claims of the group members (as at the commencement of this proceeding) are:

- (a) what knowledge did the defendant obtain concerning the incidence and extent of flooding and rising river levels in Europe in April and early May 2013 prior to the relevant period?
- (b) what enquiries did the defendant make prior to the relevant period concerning the incidence and extent of flooding and rising river levels in France and Germany in April and early May 2013, and whether those enquiries were reasonable having regard to the position and circumstances of the defendants?
- (c) what warnings and information to prospective passengers on cruises did other tour operators, in comparable position and circumstances to the defendant, provide to prospective passengers on cruises along European rivers in April and early May 2013, prior to the relevant period?
- (d) whether any guarantee that the services supplied with due care and skill required the defendant, in advance of the scheduled cruises in the relevant period, to cancel or delay cruises and to provide refunds and/or credits.

- (e) whether any guarantee to render services with due care and skill required the defendant to disclose to the plaintiff and group members, in advance of scheduled tour packages in the relevant period:
 - A information it and/or they had acquired, prior to the relevant period, about the incidence and extent of flooding and rising river levels in France and Germany affecting the river routes and destinations the subject of tour packages booked by the plaintiff and group members;
 - B the risk that the flooding and river levels was or would be so high that the cruises would not be able to proceed, that tourist destinations could only be reached by bus transportation and that accommodation would be required onshore.
- (f) whether any guarantee that services would be reasonably fit for the purpose of enjoyment of travel to destinations and accommodation by cruises down the French and German rivers was satisfied in circumstances where the defendant failed to cancel or delay the tours prior to the departure of the group members and apprise and offer them proposed alternative tours or cruises;
- (g) whether any guarantee that services would achieve the desired result of travelling to destinations and accommodation by cruise down the French and German rivers was satisfied in circumstances where the defendant failed to cancel or delay the tours prior to the departure of the group members and apprise and offer them proposed alternative tours or cruises;
- (h) whether any failure to comply with a consumer guarantee applicable to the supply of services under Subdivision B, Div 1 of Part 3-2 of the Australian Consumer Law was a "major failure" of the purposes of s 268 of the Australian Consumer Law (as Sch 2 to the Competition and Consumer Act 2010 (Cth)) and/or could not be remedied; and
- (i) the heads of compensable damage.

SIGNATURE OF LEGAL REPRESENTATIVE

This statement of claim does not require a certificate under section 347 of the Legal Profession Act 2004.

Signature



Capacity

Solicitor

Date of signature

~~2 December 2015~~ 5 March 2020

NOTICE TO DEFENDANT

If you do not file a defence within 28 days of being served with this statement of claim:

- **You will be in default in these proceedings.**
- **The court may enter judgment against you without any further notice to you.**

The judgment may be for the relief claimed in the statement of claim and for the plaintiff's costs of bringing these proceedings. The court may provide third parties with details of any default judgment entered against you.

HOW TO RESPOND

Please read this statement of claim very carefully. If you have any trouble understanding it or require assistance on how to respond to the claim you should get legal advice as soon as possible.

You can get further information about what you need to do to respond to the claim from:

- A legal practitioner.
- LawAccess NSW on 1300 888 529 or at www.lawaccess.nsw.gov.au.
- The court registry for limited procedural information.

You can respond in one of the following ways:

1. **If you intend to dispute the claim or part of the claim**, by filing a defence and/or making a cross-claim.
2. **If money is claimed, and you believe you owe the money claimed**, by:
 - Paying the plaintiff all of the money and interest claimed. If you file a notice of payment under UCPR 6.17 further proceedings against you will be stayed unless the court otherwise orders.
 - Filing an acknowledgement of the claim.
 - Applying to the court for further time to pay the claim.

3. **If money is claimed, and you believe you owe part of the money claimed, by:**

- Paying the plaintiff that part of the money that is claimed.
- Filing a defence in relation to the part that you do not believe is owed.

Court forms are available on the UCPR website at www.lawlink.nsw.gov.au/ucpr or at any NSW court registry

REGISTRY ADDRESS

Street address	Supreme Court of New South Wales 184 Phillip Street SYDNEY NSW 2000
Postal address	GPO Box 3 SYDNEY NSW 2001
Telephone	1300 679 272

FURTHER DETAILS ABOUT PLAINTIFF

Plaintiff

Name David Moore
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Speers Point NSW 2284

Legal representative for plaintiff

Name Benjamin Hemsworth
Practising certificate number 51908
Firm Somerville Legal (ACN 117 159 172)
Contact Adam Cutri, Cameron Graham
Address ~~Level 2, 65 Berry Street~~
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Telephone (02) 9923 2321
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DETAILS ABOUT DEFENDANT

Defendant

Name Scenic Tours Pty Limited
Address 50 Hunter Street,
Newcastle NSW 2300